

WO

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

9 Charles A. Gulden,) No. CV 08-1805-PHX-NVW
10 Plaintiff,) **ORDER**
11 vs.)
12)
13 Pete Geren, Secretary, United States))
14 Army,)
15 Defendant.)

17 Defendant Pete Geren, Secretary of the Army (“United States”) moves for
18 judgment on the pleadings under Fed. R. Civ. P. 12(c). (Doc # 22.) Plaintiff Charles A.
19 Gulden’s (“Gulden”) appears pro se. “A document filed pro se is ‘to be liberally
20 construed’” *Woods v. Carey*, 525 F.3d 886, 889 (9th Cir. 2008) (citing *Erickson v.*
21 *Pardus*, 127 S. Ct. 2197, 2200 (2007) (per curiam)). This order addresses only the
22 arguments and issues briefed by the parties.

23 The Court dismissed Gulden’s original complaint because he had not alleged a
24 non-discreet act that took place within 45 days of his contacting an Equal Employment
25 Opportunity (“EEO”) counselor and because he had not alleged facts sufficient to raise
26 his retaliation claim above the speculative level. (Doc. # 14.) Gulden’s first amended
27 complaint is almost identical to his original complaint, but he has attached a 34 page
28 affidavit and 57 exhibits to strengthen his factual allegations. The United States does not

1 object to Gulden's filing, so the Court will consider his affidavit and the attached exhibits
2 in ruling on the United States' motion for judgment on the pleadings. Fed. R. Civ. P.
3 10(c); *cf. Edwards v. Marin Park, Inc.*, 356 F.3d 1058, 1062 (9th Cir. 2004)
4 (“[A]ttachments to a complaint are to be considered part of the complaint in deciding a
5 Rule 12(b)(6) motion.” (citing *Hal Roach Studios, Inc. v. Richard Feiner & Co.*, 896 F.2d
6 1542, 1555 n.19 (9th Cir. 1990))). “A judgment on the pleadings is properly granted
7 when, taking all the allegations in the pleadings as true, the moving party is entitled to
8 judgment as a matter of law.” *Nelson v. City of Irvine*, 143 F.3d 1196, 1200 (9th Cir.
9 1998).

10 In August 2005, Gulden entered into a negotiated settlement agreement (“NSA”)
11 to resolve an EEO complaint that he had brought against his superior at the United States
12 Army Proving Ground, James Wymer (“Wymer”). The NSA required that Gulden be
13 “temporarily promoted to the position of Mission Facilities and Requirements Manager,
14 GS-0301-14, step 7” and that “this temporary promotion will be converted to a permanent
15 promotion effective on September 10, 2006.” (Doc. # 16, Ex. 2.) Gulden was, in fact,
16 promoted to that position. However, he alleges that Wymer has retaliated against him for
17 his previous EEO activity by directing his immediate supervisors, William Rezin
18 (“Rezin”) and Bernice Gonzalez (“Gonzalez”), to harass him with the ultimate goal of
19 coercing him out of his job. Specifically, Gulden alleges that, in 2006 and 2007, he
20 received arbitrary performance evaluations from Rezin and Gonzalez in retaliation for his
21 protected activity. He also alleges that Gonzalez has subjected him to a hostile work
22 environment by refusing to apply the job description dictated by the NSA and by
23 repeatedly fabricating failures or wrongdoing by Gulden to disparage his work
24 performance.

25 To establish a prima facie case of retaliation under Title VII of the Civil Rights
26 Act of 1964, 42 U.S.C. § 2000e-3(a), a plaintiff must show “(1) involvement in a
27 protected activity; (2) an adverse employment action; and (3) a causal link between the
28 two.” *Brooks v. City of San Mateo*, 229 F.3d 917, 928 (9th Cir. 2000). The United States

1 moves for judgment on the pleadings because none of the evidence attached to Gulden’s
2 complaint shows that his previous protected activity caused Rezin or Gonzalez to give
3 him a negative performance evaluation. The temporal relationship between Gulden’s
4 protected activities and the allegedly arbitrary performance reviews does not, by itself,
5 raise an inference of causation under the facts as alleged. Where the only proof of
6 causation is the temporal proximity of a protected activity and an adverse employment
7 action, “the temporal proximity must be ‘very close[.]’” *Clark County Sch. Dist. v.*
8 *Breeden*, 532 U.S. 268, 274 (2001). In this case, there was an eighteen month gap
9 between Gulden’s original EEO complaint and his 2006 performance review. There was
10 a ten month gap between his 2006 EEO complaint and his 2007 performance review. Our
11 circuit has held that a nine month gap was too long to infer causation from temporal
12 proximity alone. *Manatt v. Bank of Am.*, 339 F.3d 792, 802 (9th Cir. 2003).
13 Accordingly, the gap between Gulden’s protected activities and the alleged adverse
14 employment actions is too long to infer causation from temporal proximity alone.

15 Temporal proximity is not the only way to prove a causal relationship between a
16 protected activity and an adverse employment action. “[C]ircumstantial evidence of a
17 ‘pattern of antagonism’ following the protected conduct can . . . give rise to the inference
18 [of causation].” *Porter v. Cal. Dep’t of Corr.*, 419 F.3d 885, 895 (9th Cir. 2005) (quoting
19 *Kachmar v. SunGard Data Sys., Inc.*, 109 F.3d 173, 177 (3rd Cir. 1997)). In *Porter*, the
20 Plaintiff alleged a pattern of antagonism that included her supervisors “refusing to grant
21 Porter’s requests for vacation or holidays, requiring Porter to be tested for tuberculosis by
22 her own physician, threatening disciplinary action while she was on medical leave,
23 leaving a negative performance evaluation in her personnel file, and instructing her to
24 enter the work site through the back gate.” *Id.* at 893. Her supervisors also “ate and then
25 spat in Porter’s food in 1996 or 1997; . . . referred to her as a ‘fucking bitch’ . . . ; . . . told
26 another correctional officer that Porter was a ‘whore’ . . . and glared at her during the
27 investigation that commenced in October 1998.” *Id.*

28

1 Gulden attempts to document such a pattern of antagonism from his immediate
2 supervisor, Gonzalez, using his affidavit and the attached exhibits. Gonzalez allegedly
3 questioned Gulden about his arrival time at work and his attendance at scheduled
4 meetings, repeatedly admonished Gulden not to send e-mails or project proposals outside
5 of the office without coordinating with her, reprimanded him for not inputting his
6 schedule into a computer tracking system, and confronted him about a complaint about
7 his behavior received from a contractor in the office. Gulden alleges that Gonzalez
8 entirely fabricated each of these problems with his work performance. He also alleges
9 that, on two occasions, Gonzalez stated that she had Wymer's support to revoke the
10 promotion he obtained as a result of the NSA.

11 Accepting the truth of all of these allegations, they do not indicate that the ratings
12 Gulden received on his 2006 and 2007 performance evaluations were caused by his
13 protected activities. If Gulden's supervisors aimed to sabotage his evaluations to remove
14 him from his promoted position, they would have declined to make his promotion
15 permanent on September 10, 2006, as specified by the NSA. They did not. Gulden has
16 continued to work in his promoted position. Gonzalez and Rezin actually gave him a
17 higher performance rating in 2007 than in 2006, despite his filing of an additional EEO
18 complaint in September 2006. Since Gulden has maintained his promoted position and
19 his performance rating has improved despite his continuing EEO activity, it would be
20 entirely unreasonable to infer that his protected activities caused him to receive poor
21 performance ratings.

22 Gulden's hostile work environment claim also fails as a matter of law. To
23 establish a prima facie case of harassment, Gulden must show that he was subject to (1)
24 verbal or physical conduct that was unwelcome; (2) that the conduct was because of his
25 protected characteristic—in this case, Gulden's engagement in protected activity; and (3)
26 that the conduct was sufficiently severe or pervasive to alter the conditions of his
27 employment and create an abusive work environment. *Cf. Vasquez v. County of L.A.*, 349
28 F.3d 634, 642 (9th Cir. 2003). The United States moves for judgment as a matter of law

1 because the conduct of Gulden’s supervisors, Gonzalez and Rezin, was not sufficiently
2 severe. “To determine whether conduct was sufficiently severe or pervasive to violate
3 Title VII, we look at ‘all the circumstances, including the frequency of the discriminatory
4 conduct; its severity; whether it is physically threatening or humiliating, or a mere
5 offensive utterance; and whether it unreasonably interferes with an employee’s work
6 performance.’” *Id.* (quoting *Clark County Sch. Dist. v. Breeden*, 532 U.S. 268, 270–71
7 (2001)).

8 In addition to the reprimands and admonishments already mentioned, Gulden
9 alleges that Gonzalez has refused to allow him to function in his role as Mission Facilities
10 and Requirements Manager. Gonzalez allegedly instructed Gulden to perform tasks as a
11 team leader for their group, subjected him to close technical and administrative
12 supervision, refused to place him on the Real Property Group Planning Board and instead
13 made him part of a “working group,” and deprived him of independent contact with the
14 commander of the Yuma Proving Ground on matters pertaining to his job duties. The
15 Court assumes, for purposes of this motion, that Gulden is correct that these are
16 departures from the official job description for his position. Even so, these departures,
17 combined with the reprimands from Gonzalez, are not severe enough to alter the
18 conditions of his employment and create an abusive work environment. *See Hines v. Cal.*
19 *Pub. Util. Comm.*, 2009 U.S. Dist. Lexis 10066 at *17–18 (N.D. Cal. Feb. 3, 2009)
20 (holding that a supervisor’s “demanding management style . . . did not rise to the level
21 required to state a hostile work environment claim”).

22 Gulden’s allegations are similar to the complaints of the plaintiff in *Garity v.*
23 *Potter*, 2008 U.S. Dist. Lexis 81445 at *9 (D. Nev. Mar. 27, 2008). There, the plaintiff
24 complained that her supervisor gave her illogical and unclear instructions, berated and
25 yelled at her, questioned the amount of time she spent on lunch breaks, constantly
26 scrutinized, watched, and “hovered around” her, put her in no-win situations, and
27 disciplined her for safety and rule violations. Assuming such allegations to be true, the
28 court held that the plaintiff had failed to allege offensive conduct severe enough to create

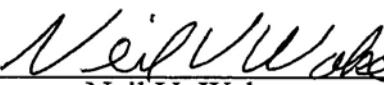
1 a hostile work environment. *Id.* at *13–14. The same is true in Gulden’s case. His
2 complaints are not trivial, but the departures from his job description and the unfair
3 reprimands he has received are not sufficiently severe to create a hostile work
4 environment.

5 Gulden has not requested further leave to amend his complaint. Even if he had,
6 judgment would be entered against Gulden without further leave to amend. He has
7 already had one chance to amend his complaint. Given the extent of the documentation
8 he attached to his amended complaint, it would be futile to allow any further amendment.
9 The Court has reviewed Gulden’s entire affidavit and each of the exhibits that he filed.
10 Gulden has thoroughly explained and documented the facts of his case and those facts do
11 not amount to a violation of Title VII as a matter of law. Moreover, Gulden’s one and
12 one-half page response to the United States’ motion states nothing but bare conclusions.
13 He has refused to substantively engage the arguments made by the United States, further
14 demonstrating the futility of granting him leave to amend a second time. *See Bonin v.*
15 *Calderon*, 59 F.3d 815, 845 (9th Cir. 1995) (“Futility of amendment can, by itself, justify
16 the denial of a motion for leave to amend.”); *Ascon Properties, Inc. v. Mobil Oil Co.*, 866
17 F.2d 1149, 1160 (9th Cir. 1989) (“The district court’s discretion to deny leave to amend is
18 particularly broad where plaintiff has previously amended the complaint.”).

19 IT IS THEREFORE ORDERED that Defendant Pete Geren’s motion for judgment
20 on the pleadings (doc. # 22) is granted.

21 IT IS FURTHER ORDERED that the Clerk enter judgment in favor of Defendant
22 and that the Plaintiff take nothing. The Clerk shall terminate this action.

23 DATED this 16th day of June, 2009.
24
25
26
27
28


Neil V. Wake
United States District Judge